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7 BEFORE THE INSURANCE COMMISSIONER
8 OF THE STATE OF WASHINGTON

9
10 In the Matter of the Application regarding
11 the Conversion and Acquisition of Control of
12 Premera Blue Cross and its Affiliates

NO. G02-45

HOSPITAL ASSOCIATIONS'
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION TO
INTERVENE

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15 I. INTRODUCTION

16 On October 14, 2002 the Washington State Hospital Association (WSHA) and the
17 Association of Washington Public Hospital Districts (AWPHD) (collectively "Hospital
18 Associations") jointly filed a motion pursuant to RCW 48.31C.030(4); RCW 48.04.101;
19 chapter 34.05 RCW and WAC 284-02-070 to intervene in the proceedings related to the
20 Matter of the Application regarding the Conversion and Acquisition of Control of Premera
21 Blue Cross and its Affiliates, Docket No. G02-45. That motion showed that significant
22 interests of the Hospital Associations and the members they represent are affected by the
23 proposed Premera conversion. Accordingly, they should be allowed to intervene in the
24 proceeding and be accorded all the rights of an interested party under law, under RCW
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HOSPITAL ASSOCIATIONS' SUPPLEMENTAL
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MOTION TO INTERVENE - Page 1

1 48.31B.015(4)(b), RCW 48.31C.030(4), RCW 48.04.010; chapter 34.05 RCW, and WAC
2 284-02-070.

3 On October 24, 2002 the Commissioner issued a Case Management Order which
4 established a deadline of November 26, 2002 by which “Persons who wish to participate
5 formally in the proceedings must file a petition do so.” Order at p. 2 ¶ 1. The Order
6 further states that in accordance with RCW 48.31C.030(4) persons who establish to the
7 Commissioner’s satisfaction that the transaction affects their significant interests, will be
8 given the right to participate in the proceedings. Order at 3 ¶ 1.

10 It has come to the Hospital Associations’ attention that additional information on
11 the factual and legal basis for the Hospital Associations intervention request may be
12 helpful to the Commissioner. Accordingly, the Hospital Associations submit this
13 supplemental memorandum and supporting declarations of Claudia Sanders and Jeff Mero.

14 II. BASIS FOR INTERVENTION REQUEST

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16 The following significant interests of the Hospital Associations members are likely
17 to be effected by the Premera conversion. As explained below, the Hospital Associations,
18 through their unique expertise and resources, can assist the Commissioner in assessing the
19 impact of conversion on these and other interests that must be considered under RCW
20 48.31B.015(4)(b) and RCW 48.31C.030.

21 1. Premera is a significant payer of health related services in the state,
22 providing over one quarter of all insurance offered by full service health plans. Nearly all
23 Hospital Association members have hospital services contracts with Premera, which could
24 be affected by the proposed transaction. Hospital Associations have recently begun
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1 conducting a survey of Washington State hospitals, which will ascertain hospitals' current
2 and past experiences with Premera as a payer and would inform understanding of how a
3 conversion to for-profit status could affect future relations with hospitals. Hospital
4 Associations have particular knowledge in the area of hospital finances and have for years
5 monitored the dynamics of the market place on hospital margins. The Washington State
6 Hospital Association has produced two well-respected reports on the financial condition of
7 Washington State hospitals in the past three years. See "Washington Hospitals: Facing
8 Financial Crisis," WASHINGTON STATE HOSPITAL ASSOCIATION, 2000 and
9 "Washington Hospitals: Still Facing A Financial Crisis" WASHINGTON STATE
10 HOSPITAL ASSOCIATION, 2001. These reports show reduced payments for health care
11 services are a significant contributor to poor hospital margins, particularly in rural areas.
12 Hospital Associations are therefore well positioned to evaluate how the proposed Premera
13 transaction could further affect margins.

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16 2. Hospitals are required by the Emergency Medical Treatment and Active
17 Labor Act, 42 U.S.C. § 1395dd, to provide screening and stabilizing treatment to patients
18 presenting in their emergency rooms regardless of a patient's ability to pay for the services.
19 Hospital Association members across Washington State have experienced an increase in
20 the number of emergency room "diversions"¹ due to a variety of factors, including
21 overcrowding as a result of the inability of patients to be seen for routine, non-emergent
22 conditions in physician offices because of a lack of insurance. See "Emergency Rooms
23 May Be Pressed This Winter: Hospitals Divert Patients When Beds Fill," SEATTLE
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26 ¹ Where an ambulance en route to one hospital is re-routed or "diverted" to another hospital due to the first
hospital's inability to accept additional patients.

1 TIMES, November 24, 2000. Hospital Associations can offer expertise on the effect the
2 proposed Premera transaction could have on the amount of emergency care services
3 provided by hospitals. Hospital Associations are uniquely positioned to analyze the
4 potential impact Premera's conversion and any subsequent decrease in the number of
5 insured persons could have on hospitals' ability to provide emergency services.

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7 3. If negative changes in the affordability and availability of health insurance
8 result from Premera's conversion to for-profit status, there will be increased demand for
9 "charity care" by hospitals. The Hospital Associations monitor the amount of "charity
10 care" incurred by hospitals when they provide free care to patients without insurance and
11 who cannot afford to directly pay for care. See "Community Benefits Project Annual
12 Report," WASHINGTON STATE HOSPITAL ASSOCIATION, December, 2001.
13 Hospital Associations can provide analysis and expertise on the impact of Premera's
14 proposed conversion and any subsequent rise in the number of uninsured persons would
15 have on the amount of member hospitals' charity care.

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17 4. Hospitals, particularly those in the rural parts of Washington State, are
18 frequently the largest employers in their communities. Many of Hospital Associations'
19 rural members contract as employers with Premera to provide insurance plan coverage to
20 members' employees. In some rural areas, Premera is the only insurer that offers plans
21 Hospital Associations' members can purchase for employee health insurance coverage.
22 Reported effects of similar insurance company transactions in other states suggest a for-
23 profit insurance company may be less committed to the small group markets represented
24 by Hospital Associations' members. See "Assessment of Market Impact of the Anthem,
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1 Inc. Purchase of Blue Cross Blue Shield of Kansas,” PRICE WATERHOUSE COOPERS,
2 December, 2001. Hospital Associations can provide critical information regarding the
3 impact the proposed transaction could have on the ability of hospitals to provide insurance
4 coverage for their employees.

5 5. The Association of Washington Public Hospital Districts is uniquely
6 positioned to analyze the potential effect of Premera’s proposed conversion to a for-profit
7 entity on the ability of public hospital districts of Washington State to fulfill their statutory
8 purpose. Public hospital districts, as local governmental entities, have certain legal
9 responsibilities to make health care available in their communities. RCW 70.44.003 states
10 in part that the purpose of public hospital districts is “to provide hospital services and other
11 health care services for the residents of such districts and other persons.” Reduced
12 payments or increased number of uninsured patients resulting from the conversion would
13 have a negative impact on availability of health care services in the rural communities,
14 which tend to be served by public hospital districts.

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17 6. Hospital Associations also can address potential anticompetitive aspects of
18 the proposed Premera transaction on hospitals. Hospital Associations note that some
19 hospital members expressed unwillingness to testify at the public “town hall” meetings
20 conducted by the Commissioner due to concerns Premera would retaliate against them for
21 speaking out publicly against the transaction. Hospital Associations also note that a for-
22 profit Premera may be more likely to merge with or be purchased by another health
23 insurance company, potentially resulting in consolidation of the health insurer market in
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1 Washington State. Hospital Associations can offer assessment of the potential effect such
2 an outcome would have on hospitals.

3 7. Through internal and external expertise, the Hospital Associations are
4 prepared to provide a further assessment of the proposed conversion's impact from a
5 hospital perspective, including evidence of effects in other jurisdictions. This would
6 include impacts on health plan payments to hospitals, ability to continue offering current
7 levels of service, and hospital financial stability.
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9 III. LEGAL ANALYSIS

10 Hospital Associations assert that, under the standard articulated in RCW
11 48.31B.015(4)(b) and RCW 48.31C.030(4), their significant interests are affected by the
12 proposed Premera transaction such that the Commissioner should allow them to intervene
13 in the proceedings. RCW 48.31B.015(4)(b) and RCW 48.31C.030(4) state in part,
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15 At the hearing, the person filing the statement, the health carrier², and any person
16 whose significant interest is determined by the commissioner to be affected may
17 present evidence, examine and cross-examine witnesses, and offer oral and written
arguments, and in connection therewith may conduct discovery proceedings in the
same manner as is allowed in the superior court of this state.

18 RCW 34.05.443(1), which sets forth the standard for intervention in an
19 administrative proceeding states,
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21 The presiding officer may grant a petition for intervention at any time, upon
22 determining that the petitioner qualifies as an intervenor under any provision of law
and that the intervention sought is in the interests of justice and will not impair the
orderly and prompt conduct of the proceedings.

23 Read together, these statutes allow the Commissioner to grant intervention to any
24 party whose significant interests he deems to be affected, if the intervention sought is in
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26 ² In RCW 48.31B.015(4)(b), the "insurer".

1 the interests of justice and will not impair the orderly and prompt conduct of the
2 proceedings.

3 In Washington State, the interests of the policy holders, creditors and the public in
4 an insurance company's actions have been found to be significant. In a case relating to the
5 Washington State Insurance Commissioner's taking possession of a domestic insurance
6 company as a statutory rehabilitator under RCW 48.31.030, the Washington State Supreme
7 Court stated that policy holders, creditors, and the public have a significant interest in the
8 investments of a mutual insurance company. Keuckelhan v. Federal Old Line Insurance
9 Company (Mutual), 69 Wash.2d 392, 411, 418, P.2d 443, 456 (1966) (superseded on other
10 grounds by State v. WWJ Corp., 138 Wash.2d 595, 980 P.2d 1257 (1999)). Similarly,
11 Hospital Associations have a significant interest in the conversion transaction activities of
12 Premera because their members will be directly or indirectly affected by a conversion of
13 Premera to a for-profit entity. This is true for a number of reasons set out in detail in
14 Section II of this motion and the supporting declarations, including the fact that most
15 hospitals in Washington State have contractual relationships with Premera that could be
16 altered by the outcome of the proposed transaction. Also, any increases in uninsured and
17 under-insured patients or reduced hospital payments would affect hospital viability and
18 public hospitals' ability to fulfill their statutory purpose.

19 Other Washington State cases involving intervention are instructive as to when
20 interests are deemed to be sufficient to allow intervention. Intervention is appropriate
21 under CR 24(a)(2) "... when the applicant claims an interest relating to the property or
22 transaction which is the subject of the action and he is so situated that the disposition of the
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1 action may as a practical matter impair or impede his ability to protect that interest unless
2 the applicant's interest is adequately represented by existing parties." In determining
3 whether the Yakama Indian Nation should be allowed to intervene under CR 24(a)(2) in
4 the Columbia Gorge Audubon Society's appeal of an administrative decision the court
5 found, "The intervenor need make only a minimal showing that its interests may not be
6 adequately represented." Columbia Gorge Audubon Society v. Klickitat County, 98
7 Wn.App. 618, 629, 989 P.2d 1260 (1999) quoting United States v. Brooks, 163 F.R.D.
8 601, 604 (D.Or.1995); California v. Tahoe Regional Planning Agency, 792 F.2d 775, 778
9 (9th Cir. 1986). The court went on to state, "The relevant questions are: Will the Audubon
10 Society *undoubtedly* make *all* the Yakama Nations arguments? That is, is the Audubon
11 Society willing to make those arguments? Will the Yakama Nation more effectively
12 articulate any aspect of its interest?" Id. at 630, 989 P.2d at 1266-67 (emphasis in
13 original). The Hospital Associations, as representatives of their members, assert a
14 substantial interest in the proposed transaction, for the reasons set forth above and
15 additional reasons alluded to in their original motion. While we have confidence in the
16 Commissioner's staff, the Hospital Associations and their members have interests that are
17 different from the interests of the staff with regard to this transaction. Simply put, the staff
18 has no obligation to look out for the interests of hospitals. Hospital Associations therefore
19 suggest that their significant interests would be not be adequately represented by the Office
20 of the Insurance Commissioner or other parties that may be granted intervention status.
21 Unless granted intervenor status, Hospital Associations will not be afforded access to
22 proprietary information that would allow them to analyze the extent to which the proposed
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1 transaction would affect their members. This is particularly true with respect to potential
2 decreases in hospital payments, hospital services reductions, and possible anticompetitive
3 aspects of the proposed transaction that would affect hospitals. Hospital Associations alone
4 possess the necessary expertise to perform analysis in these areas.

5 Washington cases considering when a person has standing to obtain judicial review
6 of agency action under the Administrative Procedure Act are also helpful in understanding
7 the nature of the inquiry as to whether Hospital Associations have established a sufficient
8 basis upon which to intervene in the proceedings. RCW 34.05.530 addresses when a
9 person has standing to obtain judicial review of agency action. It states a person has
10 standing to obtain judicial review of the agency action,
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12 ...if that person is aggrieved or adversely affected by the agency action. A person
13 is aggrieved or adversely affected within the meaning of this section only when all
14 three of the following conditions are present: (1) The agency action has prejudiced
15 or is likely to prejudice that person; (2) That person's asserted interests are among
16 those that the agency was required to consider when it engaged in the agency action
17 challenged; and, (3) A judgment in favor of that person would substantially
18 eliminate or redress the prejudice to that person caused or likely to be caused by the
19 agency action.

20 In order to have standing under 34.05.530, the person must meet the "injury in fact"
21 requirement and the "zone of interest" test. Washington Independent Telephone Assn. v.
22 Washington Utilities and Transp. Com'n., 110 Wn.App. 498, 509, 41 P.3d 1212, 1219
23 (Division II, 2002). The first and third factors of RCW 34.05.530 require a showing of
24 "injury in fact" while the second requires the party to show the legislature intended the
25 agency to protect the person's interests when taking the action at issue. St. Joseph Hospital
26 and Health Care Center v. The Department of Health, 125 Wn.2d 733, 740, 887 P.2d 891,
896 (1995). To meet the injury in fact portion of the test, the threat of injury shown must

1 be concrete. Alan v. University of Washington, 140 Wn.2d 323, 332-33, 997 P.2d 360,
2 365 (2000).

3 Hospital Associations' potential injuries involve the possibility of serious monetary
4 losses in the form of reduced payments and impaired ability to effectively negotiate
5 contracts with health plans. These potential injuries threaten hospitals' financial stability
6 and the ability to continue offering the current level of medical services if the proposed
7 Premera transaction is approved. For Hospital Associations' members, the threat of injury
8 is concrete. Furthermore, the Washington State Supreme Court follows the United States
9 Supreme Court rule to routinely recognize probable economic injury resulting from agency
10 actions that alter competitive conditions as sufficient to satisfy the injury in fact
11 requirement. Washington Independent Telephone, 110 Wn.App. at 509, 41 P.3d at 1219;
12 Seattle Bldg. & Const. Trades Council, 129 Wn.2d 787, 795, 920 P.2d 581 (1996). The
13 proposed conversion of Premera could potentially alter the competitive environment for
14 health plans and hospitals contracting with health plans in Washington State. As mentioned
15 previously, a for-profit Premera could attract an outside purchaser resulting in
16 consolidation of the health plan market place. Additionally, hospitals, particularly those in
17 parts of the state where Premera currently is the nearly exclusive private payer for health
18 care services, have expressed concerns about retaliation from Premera during contract
19 negotiations if they publicly oppose the conversion.
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23 The zone of interest test, which focuses on legislative intention to have the agency
24 protect the party's interest, addresses the concern that mere injury in fact is not necessarily
25 enough to confer standing because so many persons are potentially "aggrieved" by agency
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1 action. St. Joseph Hospital, 125 Wn.2d at 740, 887 P.2d at 896. Ample evidence exists that
2 legislators intended to protect interests such as Hospital Associations when enacting the
3 Holding Company Act statute and RCW 48.31B.015(4)(b) and RCW 48.31C.030(4)
4 specifically. The statute clearly contemplates the intervention of parties other than the
5 Commissioner and the insurance company in the proceedings. It allows intervention of
6 parties whose significant interests are determined by the Commissioner to be affected. The
7 statute sets out a process for participation in the hearing provided for under RCW
8 48.31B.015(4)(b) and RCW 48.31C.030(4) that involves equal participation from the
9 Commissioner, the insurance company, and the intervening parties.
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11 In other conversion proceedings in the U.S., including proceedings in Kansas,
12 Maine, and New Hampshire, hospital associations have been granted the right to intervene
13 in conversion related proceedings, in some cases based on a standard similar to the
14 Washington “significant interests” standard. For an example, see Order on Intervention in
15 the Matter of the Conversion and Acquisition of Blue Cross and Blue Shield of Kansas,
16 Inc., Docket No. 3014-DM ¶ 13 where the Kansas Hospital Association was found to be
17 “substantially effected,” and granted intervention.³
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19 Finally, RCW 34.05.443 requires that the intervention sought be in the interests of
20 justice and not impair the orderly and prompt conduct of the proceedings. Hospital
21 Associations seek intervention in the proceedings in the interests of justice. In particular
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23 ³ See also Order Granting Applications to Intervene of the Maine Health Alliance, Maine Medical
24 Association, Maine Council of Senior Citizens, Consumers for Affordable Health Care, Maine People’s
25 Alliance, Maine Ambulatory Care Coalition, and Central Maine Healthcare Corporation. Docket No. INS-99-
26 14 (Consolidated) p. 2 ¶ 1-4 where the Maine Health Alliance, an integrated delivery system whose hospitals
had entered into a Hospital Services Agreement with Blue Cross and Blue Shield of Maine, were granted
intervention as of right in the conversion proceedings based on the contractual relationship between the
hospitals and the insurer.

1 they seek to illustrate the impact the proposed Premera transaction would have on
2 Washington State's hospitals, the hospitals' financial viability, and ability to offer services.
3 Hospital Associations are committed to making the conduct of the proceedings as orderly
4 and efficient as possible. If granted status as intervenors, they will work with other parties,
5 and with the Office of the Insurance Commissioner to promote efficiencies and avoid
6 duplications.
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1 IV. CONCLUSION

2 Hospital Associations have set forth additional factual and legal basis establishing
3 their significant interests in the proposed Premera transaction. Because their significant
4 interests will be affected by the proposed Premera transaction, Hospital Associations
5 respectfully urge the Commissioner to grant them intervenor status in these proceedings.

6 Respectfully submitted this _____ day of November, 2002.

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9 By _____
10 Taya Briley, WSBA #30455
11 Director, Legal Services and Health Policy
12 Association of Washington Public Hospitals
13 District
14 300 Elliott Avenue West, Suite 300
15 Seattle, WA 98119

16 BENNETT BIGELOW & LEEDOM, P.S.

17 By _____
18 Michael Madden, WSBA #8747
19 Attorney at Law
20 999 Third Avenue, Ste. 2150
21 Seattle, WA 98104
22 Attorneys for Proposed Intervenors WSHA
23 and AWPHD

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